

Developing Agreements for Transboundary EIA in Asia: From Sub-Regional to Regional?

Seminar on Perspectives on Transboundary
Environmental Governance in Australia and Beyond,
ANCORS, 12 May 2011

Overview

- Introduction: regional & sub-regional TEIA systems globally for areas within national jurisdiction & developing IL
- Purpose: consider potential for regional Asian agreement
- Approach: evaluate regional agreements in Asian context & Asian sub-regional agreements, related protocols / guidance & practice
 - Espoo Convention, Central Asia
 - Helsinki Convention, Central and NE Asia
 - Mekong Agreement, SE Asia
 - Tumen Agreements, NE Asia
 - Tehran Convention, SW and Central Asia (Caspian Sea)
- Analyse potential for a regional agreement
- Conclusions: A regional ...or a global agreement?

Introduction

- Regional & sub-regional TEIA systems globally, predominantly in Europe & related areas
 - Nordic Environmental Protection Convention
 - Baltic Sea Environmental Protection Convention
 - Espoo Convention
 - Helsinki Convention
- Also in the Americas
 - North American Agreement on Environmental Cooperation
 - Central American Agreement on Strengthening EIA
- Espoo Convention the standout treaty: 45 Parties with potential global application

Introduction (cont)

- Treaties supported by development of general international law on EIA by ICJ
 - Hungarian Dams case
 - Pulp Mills on the River Uruguay case
- ...it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource.

Purpose

- Bastmeijer & Koivurova (2008) conclude TEIA urgently needed in developing countries & countries in transition
- Given political will & need to satisfy lending institutions to source funding for development, potential TEIA expansion
- Parts of Asia already have experience with development of TEIA procedure, if very limited / non-existent practice
- Some preliminary research questions:
 - What is the state of TEIA in Asia?
 - What agreements apply to which states?
 - What is the relationship between the agreements?
 - What recent developments have there been?
 - Are current systems working?
 - Is there a need for future reform?

The Caucasus and Central Asia



Espoo Convention (Central Asia)

- *Convention on EIA in a Transboundary Context* (Espoo, 1991)
- Application to 4 Asian states:
 - Kazakhstan (Espoo Party)
 - Kyrgystan (Espoo Party)
 - Tajikistan (passed domestic implementing legislation)
 - Uzbekistan (preparing to ratify)
 - Also Russia (signatory)
- Based on Decisions at 2nd and 3rd MOPs (2001 & 2004):
‘Strengthening sub-regional cooperation’, aimed at improving ratification of countries in transition
- Supporting *Guidelines on EIA in a Transboundary Context for Central Asian Countries* (2007)
- See: <http://www.unece.org/env/eia/>

Espoo Convention: Practice in Central Asia

- Pilot project on application of the *Guidelines* (2006-2009) to demonstrate effective implementation of TEIA in Kazakhstan and Kyrgystan
- Project was a copper and gold mining operation in Kyrgystan close to Kazakh border
- Downstream water pollution a significant potential impact
- Procedure involved Kazakh authorities and public
- Based on experience and training sessions, national EIA laws amended to clarify procedures and include public participation



Transboundary waters in Asia

Waters:

- Bilateral agreement
- Multilateral agreement
- Commission

Countries:

- Transboundary agreement
- Transboundary commission

Basins:

- Multilateral agreement

Map produced by ZOF Environment Network, May 2011

Helsinki Convention (Central & NE Asia)

- *Convention on the Protection & Use of Transboundary Watercourses & International Lakes* (Helsinki, 1992)
- Application to five Asian states: Azerbaijan, Kazakhstan, Kyrgyzstan, Russia, Uzbekistan
- Major institutions: Working Group on Monitoring & Assessment, Legal Board
- Legal Board Draft Guide to Implementing the Convention (2009) advocates application of Espoo Convention & Kiev Protocol
- See: <http://www.unece.org/env/water/welcome.html>

Helsinki Convention: TEIA Practice in Central Asia

- Development of the Rogun hydro electric dam by the Tajikistan Government a major concern of Uzbekistan's
- Begun during Soviet times, although halted in 1990s
- Neighbouring Uzbekistan's withdrawal from regional power grid in 2009 ended Tajikistan's electricity supply from Russia
- Now however Uzbekistan as downstream state concerned about its water supply for irrigation of cotton industry
- Project is to be assessed under World Bank procedures (major financier) including riparian issues & cross-border impacts
- Fact that is Tajikistan is not yet a member of the Espoo Convention, nor a member of the Helsinki Convention, a problem

Helsinki Convention: TEIA Practice in Central Asia (cont)

- Tajikistan also planning to construct reservoir & hydropower station in upper reaches of Zeravshan River - might affect quantity of water downstream, impacting upon Uzbekistan
- Absence of Tajikistan's membership again a problem
- N.B. *Framework Convention for the Protection of the Environment for Sustainable Development in Central Asia* an attempt to provide a legal basis for cooperation between Central Asian States on a broad range of environmental issues (not in force)



Mekong Agreement (SE Asia)

- *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin* (Chiang Rai, 1995)
- Application to four states:
 - Cambodia, Laos, Thailand, Vietnam
- Two 'dialogue partners' also in cooperative framework
 - China, Myanmar
- Mekong River Commission (MRC) and Joint Committee (JC) main institutions
- Key activities: Basin Plan, protection of environment and ecosystems, reasonable & equitable use / protection etc of water
- Potential application of TEIA via *Procedures for Notification, Prior Consultation and Agreement* (2003) and *Guidelines on Implementation*
- See: <http://www.mrcmekong.org/>

Mekong Agreement: TEIA Practice

- Danish sponsored Australian study (2006) provides indicative (negative) experience. Four controversial case studies outlined, no TEIA:
 - Vietnamese Sesan dam affecting Cambodia
 - Thai water grid approved outside framework of Agreement
 - Laos Thuen dam approved outside framework of Agreement
 - Chinese development on Upper Mekong (limited TEIA)
- Study criticises flexibility of rules, lack of enforcement / participation provisions, lack of motivation / political will by MRC and Parties
- Recommends binding Protocol based on Espoo Convention

Mekong TEIA Practice (cont)

- In April 2011, MRC deferred a decision on the Xayaburi hydropower plant in Laos
 - First dam on the mainstream of the Lower Mekong Basin
 - Vietnam recommended deferring all hydropower development on the Mekong mainstream for at least ten years
 - Likely to be determined at a ministerial level at a later date
- MRC Final Report on *SEA of Hydropower on the Mekong Mainstream* (2010)
 - Proactive effort to deal with 12 hydropower schemes, 8 in Laos
 - Also recommends deferring development for decade
- Despite the 2011 decision and 2010 SEA Report, national interests again likely to dominate



Map of Greater Tumen Region

Tumen Agreement (NE Asia)

- *Agreement on the Establishment of the Tumen River Area Development Coordination Committee and Agreement on the Establishment of the Consultative Commission for the Development of the Tumen River Economic Development Area and NE Asia* (both New York, 1995)
- Application to four states: China, Russia, Mongolia, South Korea
- Coordination Committee and Consultative Commission main institutions; Greater Tumen Initiative (GTI) Environment Board
- Key activities: development and EIA in relation thereto
- TEIA applied through *Memorandum of Understanding on Environmental Principles* (1995)
- See: <http://www.tumenprogramme.org/>

Tumen Programme: TEIA Practice

- GTI Projects approved at the 9th Consultative Commission Meeting include the GTI Environmental Cooperation
- This focuses on potential for TEIA and environmental standardization in NE Asia
- Other than MOU, no elaboration of TEIA procedure
- Specific projects include the Mongolia–China Railway Feasibility Study, (proposal for a railway line linking Mongolia with the seaports in the region)
- In November 16-19 2010, the 7th Annual TEIA Workshop was held in South Korea, with objective of establishing a TEIA system for NE Asia



Tehran Convention

(SW and Central Asia, Caspian Sea)

- *Framework Convention for the Protection of the Marine Environment of the Caspian Sea* (Tehran, 2003)
- Application to five ‘littoral’ states: Azerbaijan, Iran, Kazakhstan, Turkmenistan and Russia
- Main institution Secretariat
- Key activities: protection of Caspian marine environment from pollution, sustainable use of resources
- TEIA applied through *Guidelines on EIA in a Transboundary Context in the Caspian Sea Region* (2003) – based on *Espoo C.*
- Development of *TEIA Protocol* for adoption at MOP3 (2011)
- See: <http://www.tehranconvention.org/>

Caspian TEIA Practice

- As in Central Asia, environmental issues in Caspian region relate to energy security (primarily oil and gas resources)
- Both Caspian & Central Asian regions of significant geopolitical importance, north of Iran, Afghanistan & Pakistan
- New states in region previously occupied by former Soviet Union has left a legacy of the military-industrial complex
- Emerging TEIA practice to deal with these issues, especially offshore oil and gas extraction
- Protocol to better deal with these issues, adoption expected at MOP3 (2011)

Caspian TEIA Practice (cont)

- Tsutsumi and Robinson (2008) discuss 2 case studies:
 - Dragon Oil, Turkmenistan and BP in Azerbaijan for offshore oil development. While Turkmenistan not a Party or signatory to the Espoo Convention, the EBRD and Dragon Oil requested Turkmen authorities to begin Espoo procedure, which didn't continue further
 - Azerbaijan International Operating Company and BP collaborated in an oilfield development project & prepared an EIS and scoping report, although again the procedure didn't continue further
 - In both cases, poor communication the major problem, & as in other regions (Tumen), training workshops subsequently development to trial and develop procedures and Protocol

Potential for a Regional Asian TEIA Agreement?

- Need to harmonise procedures & transpose in national law
- Project proponents need to ensure all legal requirements met
- Overlapping / absence of membership
 - Kazakhstan a Party to the Espoo, Helsinki & Tehran Conventions
 - Russia a Party to the Tehran & Helsinki Conventions & Tumen Agreements, and a signatory to the Espoo Convention
 - 1st amendment to Espoo Convention opens membership to UN states, Iran has indicated an interest in joining
 - Azerbaijan & Uzbekistan also Parties to the Helsinki Convention
 - Tajikistan's failure to ratify the Espoo or Helsinki Conventions a problem (World Bank guidelines applied to development)

Potential for a Regional Asian TEIA Agreement? (cont)

- Further influence of / advocacy for Espoo Convention
 - Development of Espoo Convention practice in Central Asia
 - Draft Guide to Helsinki Convention recommends application of Espoo Convention and Kiev Protocol
 - Protocol for adoption under Tehran Convention following Espoo-based Guidelines
 - Protocol recommended in Mekong region based on Espoo Convention
 - Emerging TEIA in Tumen region, Espoo Convention a guide
- Requirements imposed by international lending institutions on non-Parties
 - World Bank
 - European Bank for Reconstruction & Development
 - Asian Development Bank

Conclusions

- Knox (2004) believed Espoo Convention strongest candidate for global TEIA treaty, but at time only 2 Parties had ratified the 1st amendment
- Bastmeijer & Koivurova (2008) agreed Espoo Convention best candidate, but still only 9 Parties had ratified 1st amendment
- Today there are 21 Parties to the 1st amendment. The amendment comes into force when $\frac{3}{4}$ of the 34 Parties to its adoption ratify (26?)
- Given the influence of the Espoo Convention in Asia, any regional agreement must be based upon it, although may not be necessary if membership opened up globally
- Any Asian agreement must also consider other key states:
China and India

